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No. 90-985

In The

Supreme Court of the United States

October Term, 1990

JAYNE BRAY, et al.,

Petitioners,

-v.-

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF FREE CONGRESS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

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INTEREST OF AMICUS*

For more than a decade, amicus Free Congress Research and Education Foundation, a non-profit foundation, has actively sought to advance fundamental principles of judicial restraint and the rule of law. Among these

* The parties to the present case have consented to the filing of this brief. A letter granting consent has been filed with the Court by Petitioners and the letter of Respondents is being submitted herewith.

principles is the consistent application of traditional rules of statutory construction and constitutional interpretation. The proper role for the courts is settlement of legal disputes by faithful application of the law to the facts of particular cases. Only then can social policy develop as it should, unaffected by far-reaching and injudicious decisions by courts more affected by politics than law. Amicus believes this case presents this Court with such an opportunity to insist on traditional canons of interpretation.

SUMMARY OF ARGUMENT

Respondents allege their membership in the protected class of "women seeking abortions," but fail to demonstrate that Petitioners acted "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 829 (1983). This Court has construed the statutory phrase "class of persons" to require a showing of "some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). "Women seeking abortions" is not, under 42 U.S.C. Section 1985(3), a protected class defined by any invidious class-based animus. Thus Petitioners have not acted with an invidious class-based animus even if their acts impacted on Respondents, who place themselves in the class of "women seeking abortions."

Even assuming arguendo that "women seeking abortions" constitutes a gender classification, the United States Constitution creates no substantive right to be free of purely private gender classifications. This Court has held that:

> Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.

Great Am. Federal S. & L. Ass'n v. Novotny, 442 U.S. 366, 372 (1979). Respondents fail to state a claim under Section 1985(3) because freedom from private gender classification is not among the substantive rights designated by Section 1985(3).

In *Griffin*, 403 U.S. at 102 n. 9 (citation omitted), this Court left for another day the question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under . . . Section 1985(3) . . . " However, this Court need not resolve this question today. Even if the United States Constitution were now construed to create a substantive right to be free from private gender classifications, and even if an invidious sex classification would qualify for consideration as a protected "class of persons" under Section 1985(3), gender classifications are not per se invidious.

This Court tests the invidiousness of a gender classification system by determining whether the system relies on the use of "archaic and stereotypic notions." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982). Respondents' class, defined as "women seeking abortions," fails this Court's test. The class alleged by

Respondents realistically reflects the physical (and legal) differences between the sexes, in that only women can get pregnant and only women can exercise a right to seek abortions. Men can do neither.

ARGUMENT

THIS COURT MUST REVERSE THE JUDGMENT OF THE FOURTH CIRCUIT BECAUSE "WOMEN SEEKING ABORTIONS" IS NOT A PROTECTED CLASS UNDER 42 U.S.C. SECTION 1985(3)

A. Section 1985(3) provides a remedy only for a deprivation, due to an invidious classification, of substantive rights created in the United States Constitution.

This Court has held "Section 1985(3) provides no substantive rights itself . . . " *Great Am. Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). Even where the substantive right being vindicated by a Section 1985(3) action does not separately require "a group animus," Section 1985(3) imposes that requirement. *Id.*, 442 U.S. at 378.

In contrast to the statutory requirement of a class-based animus, this Court also correctly has held that where the underlying substantive right does not require state action, Section 1985(3) does not superimpose a requirement of state action. However, where the substantive right is only to be free from state action in violation of the right, Section 1985(3) protects only against state action resulting in a deprivation. *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833-34 (1983). Since Section 1985(3) provides no substantive rights, "the

rights, privileges, and immunities that Section 1985(3) vindicates must be found elsewhere . . . " *Id.*, 463 U.S. at 833-34. If the right must be protected against class-animus, a source of that right must be identified. The "rights, privileges, and immunities" to be free from private gender discrimination is nowhere to be found.

While vindication of the right of interstate travel by means other than by private gender discrimination may not depend on proof of an invidious class-based animus, a Section 1985(3) claim for deprivation of that substantive right still requires such a showing. *Novotny*, 442 U.S. at 388, n.5 (White, J., Brennan, J., and Marshall, J., dissenting). Without question, although the Constitution prohibits state action which injures First Amendment rights, there is no parallel right in the Constitution to be free from private gender discrimination.

Respondents cannot invoke Section 1985(3). "[U]nlike the Thirteenth [Amendment which] affords the plaintiff [ ] protection against discrimination in which there is no state involvement of any kind," *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (opinion of Stevens, Circuit Judge), a private conspiracy based on a gender classification does not abridge the Constitution.

B. "Women seeking abortions" is not a gender classification.

"Women seeking abortions" is not a gender classification.[1]

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[1] *In contrast see, Califano v. Westcott*, 443 U.S. 76, 83 (1979) (gender distinction conceded).

Women and men are petitioners. Women and men are respondents. Women and men support a woman's right to choose to terminate a pregnancy. Women and men oppose a woman's right to choose to terminate a pregnancy. Women and men perform abortions and provide abortion support services. The fetuses Petitioners seek to protect and save are women and men. Neither law nor logic supports Respondents' view that animus against the performance and legalization of abortion reflects a gender-based classification.

Treating "women seeking abortions" as a class is not a gender qua gender classification. Any other conclusion is untenable. Treating Respondents' class, "women seeking abortions," as gender-based discrimination eliminates the required nexus between the objective fact (plaintiff's membership in a protected class) and the subjective fact (defendant's invidiously discriminatory animus based upon plaintiff's membership in that class). Absent that nexus of protected class and prohibited animus, members of a racial minority always satisfy the protected class requirement but only by the accident of being born into one or another of various racial groupings regardless of the relevance of race to a defendant's animus. Respondents' claim fails because although they coincidentally may be women, their gender has no nexus with the alleged motivation of petitioners. In fact, abortion facility doctors and personnel, not their abortion-bound patients, are the primary focus of Petitioners' alleged conspiracy. Therefore, the Court need not resolve whether Section 1985(3) encompasses gender classification because no gender class is properly alleged.

C. Assuming arguendo "women seeking abortions" is a gender classification, Section 1985(3) does not protect any substantive right to be free from private gender classification.

Section 1985(3) prohibits conspiracies born of prohibited class-based animi which deprive class members of substantive rights found in the United States Constitution. The Constitution must provide a source of power to reach a private class-based animus for the section to be applied. Assuming arguendo the Constitution prohibits private gender classifications, as well as private racial classifications, it does so only as to a right to be free from gender classifications impairing the right to vote. There is no substantive constitutional right to be free from gender classifications which impact on the right of interstate travel. The trial court thus lacked subject matter jurisdiction to reach the federal questions presented by the complaint in this case.

1. Congressional Power.

This Court found constitutional power for Congress to reach the *Griffin* conspiracy in the Thirteenth Amendment. *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971). However, there is no "source of congressional power to reach the private conspiracy alleged by the complaint in this case." *Id.*, 403 U.S. at 105-06. The trial court lacked subject matter jurisdiction to reach a conspiracy fomented by alleged gender animus.

Congress can reach private racial discrimination because the Thirteenth Amendment proscribes private

conduct. The Constitution is devoid of an analogous provision empowering Congress to proscribe gender discrimination. While the Constitution protects the right to "pass freely from state to state" against private interference, there is no coordinate constitutional prohibition of private gender classification. *Id.*, 403 U.S. at 105-06.

Respondents cannot identify any substantive right to be free from private gender classification because "the Constitution [does not] create any right to be free of gender-based discrimination perpetuated solely through private action." *Novotny*, 442 U.S. at 381 (Powell, J., concurring). *See also, id.*, 442 U.S. at 385 (Stevens, J., concurring) ("Private discrimination on the basis of sex is not prohibited by the Constitution"); *See also, id.*, 442 U.S. at 388 n.5 (White, J., Brennan, J., and Marshall, J., dissenting) (declining to reach the issue of whether "sex discrimination by private parties . . . proceed[s] from explicit constitutional guarantees" in a case where a statutory right to be free of gender classification was presented on the facts).

This Court has never found in the Constitution a source of congressional power to reach private gender classifications. Indeed, this Court expressly overturned the decision of the Third Circuit which found such a power under the Commerce Clause, U.S. Const. art. I, § 8, in the enactment of Title VII, 42 U.S.C. § 2000e *et seq.* (1970).[2] *Novotny v. Great Am. Federal S. & L. Ass'n*, 584 F.2d 1235 (3rd Cir. 1978), *rev'd, Great Am. Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366 (1979). Relying on an

[2] *See, infra.*, n. 11.

express federal statutory substantive right, *Novotny* attempted only to reach gender classifications in the realm of employment, not interstate travel. Public classifications based on gender are subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Respondents' claim fails, however, because the Constitution affords no substantive right to be free from *private* gender classifications.

In *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981), the Fourth Circuit recognized the need to identify a source of congressional power because the plaintiff was "not a member of the Negro race." The *Ward* Court recognized that the *Griffin* Court found congressional power in the Thirteenth Amendment (despite the nature of Griffin's substantive claim being the right to interstate travel). Without explanation, however, the Fourth Circuit relied directly on the right to travel for a source of congressional power for the use of Section 1985(3) in the case of religious animus. The *Ward* rationale does not support the extension of Section 1985(3) to prohibit private gender classifications because *Ward* did something this Court has refused to do.[3]

[3] *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989), is inapposite because it dealt with a criminal provision to enforce statutory rights prohibiting classifications based upon race, color, religion, or national origin – not gender. And, in contrast, Section 1985(3) enforces no substantive constitutional (or statutory) right to be free from gender-classification in the right to travel. The criminal provision was upheld based upon the Commerce Clause because "Congress intended to invoke that power." In amending and re-enacting that section several times through 1966, Congress made findings on the impact of the

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2. Statutory Construction.

Even if Congress had the power to reach private gender classifications, they made no attempt to do so because neither this Court nor that Congress considered private gender classifications to be invidious when Section 1985(3) was passed.[4]

a. Gender Classifications Are Not Always Invidious.

The Fourth Circuit below, holding that private gender classifications are inherently invidious, relied on its earlier decision in *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985). *Buschi*, while deciding that whistleblowers are not a protected class, expressly refused to adopt either an "expansive view" of Section 1985(3) or the *Scott* majority's view. It begs the question to define a "protected" class as a class which otherwise would be "unprotected."

(1) The Minority View.

"Women' seeking abortions" are not a class "in unprotected circumstances." *Scott*, 463 U.S. at 851 (Blackmun, J., Brennan, J., Marshall, J., and O'Connor, J.,

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section on interstate commerce. On the other hand, Section 1985(3) has remained unchanged since 1871, at a time when Congress had not the slightest reason to consider the impact of gender classification on interstate commerce or to rely on the Commerce Clause.

[4] 118 CONG. REC. 8899, 8901 (1972) ("the Court has upheld many laws which plainly discriminate against women").

dissenting). "Women seeking abortions" are not vulnerable to "the possibility of ineffective state enforcement . . . " *Id.* The well-documented and effective efforts of state legislative, judicial and police protection of the exercise by women of the right to seek abortions, *see generally* Brief of Concerned Women of America as Amicus Curiae in Support of Petitioner, belies the protected status of that "class" as persons "whose beliefs or associations placed them in danger of not receiving equal protections of the laws from local authorities." *Id.*, 463 U.S. at 853. Furthermore, women compose more than fifty percent of the electorate. Therefore, "women seeking abortions" is not a protected class because even under the "expansive view" they are not "unprotected."

(2) The Majority View.

The Fourth Circuit incorrectly viewed the *Scott* majority opinion as automatically extending the coverage of Section 1985(3) to all classes with "characteristics comparable to those characterizing classes such as race, national origin, and sex." *Buschi*, 775 F.2d at 1258.

This Court refused to affirm a view that Section 1985(3) "reache[d] conspiracies other than those motivated by racial bias . . . " *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 835 (1983). The Fourth Circuit's restatement of the narrow view simply is untenable in light of this Court's holding that the "close question" is whether the Section was intended to reach anything other than racial animus:

> it is a close question whether Section 1985(3) was intended to reach any class-based animus

> other than animus against Negroes and those who championed their cause . . .

Scott, 463 U.S. at 836. Appropriate construction of the statute and the Constitution compels the conclusion that Section 1985(3) does not reach gender classifications.

Gender classifications, not considered invidious when Section 1985(3) became law, cannot be placed within the scope of Section 1985(3) retroactively by hindsight interpretations.[5] Since the enactment of Section 1985(3), the Constitution has been amended to permit Congress to reach only those private gender classifications impairing the right to vote.

b. The Nineteenth Amendment.

Congress debated and approved Section 1985(3) in 1871. Ratification of the Nineteenth Amendment to the United States Constitution occurred on or about August 18, 1920:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. Amend. XIX.

The amendment does not confer on women the right to vote. It merely prohibits gender discrimination in that right. *State v. Mittle*, 120 S.C. 526, *error dismissed*, 260 U.S.

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[5] *See for example, N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1359 (2nd Cir. 1989).

705 (1922). *See also United States v. Reese*, 92 U.S. (2 Otto) 214 (1876) (Fifteenth Amendment does not confer the right of suffrage on blacks, only forbids discrimination in the exercise of that right).

Before the passage of the Nineteenth Amendment public and private gender classification in the exercise of the fundamental right to vote was permitted. After its passage, gender classification was prohibited only in the exercise of the right to vote. A fortiori, the Constitution provides no substantive right to be free of gender classification in the exercise of the right to travel, just as before the passage of the Reconstruction Amendments the Constitution provided no substantive right to be free of racial classification in the exercise of that right.

At the time Congress enacted Section 1985(3), gender-based classifications were not considered invidious, and such classifications would not be so considered for another fifty years. Congress did not intend the section to apply to gender classifications. Because no applicable constitutional substantive right existed at the time of Section 1985(3)'s enactment, Congress could not have intended the section to apply to gender classifications. If the statute when and as written did not apply to gender classifications, the court below lacked jurisdiction to entertain its application herein. That a subsequent Congress determined gender classifications are sometimes invidious is inapposite to determining the scope of Section 1985(3).

c. The Equal Rights Amendment

The proposed Equal Rights Amendment, which would have banned invidious public gender classifications, was passed by both houses of the Congress in or around 1972, a century after the debate on the intended scope of Section 1985(3). It provided in pertinent part:

> Sec. 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972).

It was clear to opponents and proponents of the amendment that it would not apply to private conduct.

Both houses of Congress recognized that H.J.Res. 208 was not an attempt to create a substantive constitutional right to be free from private gender classifications.[6] The

[6] 116 Cong. Rec. 28004, 28005 (1970)("would not apply to purely private action"); 118 Cong. Rec. 8889, 8901 (1972) ("Much of this discrimination is directly attributable to governmental action"); 118 Cong. Rec. 8889, 8902 (1972) ("The amendment affects only governmental action; it does not affect the private action or the social relationships between men and women . . . would apply only to governmental action, and not to private or individual action"); 118 Cong. Rec. 9544, 9583 (1972) ("Private discrimination [requires a] find[ing of] state action"); 118 Cong. Rec. 9544, 9597 (1972) (sex classification requires a showing of "governmental action perpetuating sex discrimination").

record of the debate on the proposed Equal Rights Amendment unequivocally supports the conclusion that private gender classifications are not prohibited by the Constitution. Rather the debate record leads to the conclusion that Section 1985(3) does not, and was not intended to, reach private gender classifications.

Similarly the congressional debate on the proposed Equal Rights Amendment made clear that the amendment would not prohibit distinctions "based on some fair or reasonable classification, [where] all persons embraced within the classification are treated alike."[7] 118 Cong. Rec. 8899, 9083 (1972). Without doubt the debate on the proposed Equal Rights Amendment bolsters the conclusions that when enacted Section 1985(3) had not been intended to include private gender within its ambit and that gender classifications were not to be considered per se invidious.

Many states have adopted amendments to their constitutions with similar or identical language to the federal proposed Equal Rights Amendment. Where courts have

[7] *See also, id.*, at 8902 ("would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example [a classification regarding] child bearing could only apply to women"); 8904 (amendment would not invalidate classifications where women "are uniformly distinct from men", or "on the basis of ability or other relevant characteristics"). The Senate recognized that the Constitution "gives just one clearly-stated constitutional right to women [and] fails to extend to the female half of our population . . . equal protection of the laws." *Id.*, at 8905. It was further perceived that this Court had not held "that sex discrimination is 'suspect'." *Id.*

interpreted those amendments, the amendments have not been found to apply to private conduct,[8] or to ban a gender classification "that depends for its application upon a physical characteristic that is unique to one sex." *Holdman v. Olim*, 581 P.2d 1164 (Hawaii 1978). *See also, People v. Salinas*, 191 Colo. 171 (1976)("in such a case, the sexes are not similarly situated and thus equal treatment is not required").

"The constitution does not require things which are different in fact or opinion to be treated by the law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The ability to become pregnant, and the concomitant right to terminate that pregnancy, certainly is unique to women. The failed efforts to ratify the Equal Rights Amendment do not suggest otherwise.

Even if the United States had eventually ratified the proposed Equal Rights Amendment, in contrast to the conclusion of the Third Circuit in *Novotny, supra*, neither it nor any substantive provision of the United States Constitution would reach private gender classification.

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[8] *See Lincoln v. Mid-Cities Pee Wee Football Ass'n*, 576 S.W.2d 922 (Tex. Civ. App. 1979); 16C C.J.S. CONST. LAW §§ 942-43 (1985). *See also* 16A Am. Jur.2d CONST. LAW §§ 574-78 (1979); *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIVIL RIGHTS-CIVIL LIBERTIES LAW REV. 215, 231 (1971) (not applicable to "private, non-governmental" conduct).

D. Assuming arguendo the United States Constitution provides a substantive right to be free from some private gender classifications, "women seeking abortions" is not an invidious classification because private gender classifications are not inherently invidious.

This Court has found that the word "equal" in "equal protection of the law or [ ] equal privileges and immunities under the laws", in Section 1985(3), requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus . . . " *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Even assuming arguendo that some gender-based classifications are invidious, the Constitution provides no substantive right to be free from private gender classification other than in the right to vote. Assuming further that the class of "women seeking abortions" is a gender classification, Respondents complaint is still inadequate because "women seeking abortions" is not an invidious gender classification.

1. Application of the Test of the Invidiousness of a Gender Classification.

This Court frequently has confron[illegible]nder classifications, finding some invidious but not [illegible]ers. Application of this Court's stringent but "straightforward" "test for determining the validity of a gender-based classification . . . " leads to the inescapable conclusion that "women seeking abortions" is not an invidious gender classification.[9] *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

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[9] The equal protection jurisprudence of this Court examines whether or not classifications based upon sex are

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This Court should apply the following test to determine which gender-based classifications are invidious and which are not: whether the classification employs "archaic and stereotypic notions" with the result that similarly situated persons are treated differently only because of such notions.[10] *Id.*, at 725.

This Court's recent treatment of the invidiousness of gender classifications begins with the case of *Reed v. Reed*, 404 U.S. 71 (1971). *Califano v. Goldfarb*, 430 U.S. 199, 229 (1977) (Rehnquist, J., Burger, C.J., Stewart, J., and Blackmun, J., dissenting). Subsequently many members of this Court have recognized that:

> Men and women are different [in that] [o]nly the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not.
>
> . . . .
>
> If we assume, as we surely must, that characteristics possessed by all members of one class and by no members of the other class justify some disparate treatment . . . the mere fact that

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invidious, and therefore provides relevant case authority for testing gender classifications.

[10] The line between invidious and non-invidious gender classifications has been alternately characterized by this Court as "archaic and overbroad," "loose-fitting characterizations . . . premised upon their accuracy," and as a "weak congruence between gender and the characteristic or trait that gender purported to represent." *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (citations omitted).

> the [classification] draws a "gender based distinction," [ ] should not [ ] give rise to any presumption . . .

Caban v. Mohammed, 441 U.S. 380, 404-10 (1979) (Stevens, J., Burger, C.J., Rehnquist, J., dissenting), *citing*, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67-75 (1976). Respondents simply fail to identify any "sexual stereotypes" of Petitioners because there are none. *Califano v. Westcott*, 443 U.S. 76, 89 (1979).

Indeed, "[G]ender-based classifications are not invariably invalid. When men and women are not in fact similarly situated . . . [such as classifications that] reflect the physical reality that only the mother carries and gives birth to the child [the classification is not invalid.]" *Caban*, 441 U.S. at 398-99 (Stewart, J., dissenting) (citations omitted).

Pregnant women are in a "different class[ ] of persons" from women who are not pregnant. *Reed v. Reed*, 404 U.S. 71, 75 (1971). They may be treated "in different ways" both from pregnant women who are not seeking abortions and women who are not pregnant. *Id.*, 404 U.S. at 75. It is irrational to characterize a classification which recognizes that only women can get pregnant and only women can have a pregnancy terminated by abortion as an "archaic and overbroad" generalization based solely on sex. *Goldfarb*, 430 U.S. at 207, 211-12. Classifying a woman on this basis does not imply that she is inferior. *Id.*, 430 U.S. at 218 (Stevens, J., concurring). Nor does it perpetuate any "discrimination." *Id.*, 430 U.S. at 242 (Rehnquist, J., Burger, C.J., Stewart J., and Blackmun, J., dissenting). The recognition that women can get pregnant is not a " 'role-typing society has long imposed' upon

women;" rather, it is a role nature has "imposed" upon women. *Califano v. Webster*, 430 U.S. 313, 317 (1977) (quoting, *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)). Furthermore, no classification by petitioners has the capacity to confer any benefits or impose any burdens upon respondents. *Orr v. Orr*, 440 U.S. 268, 291-92 (1979) (Rehnquist, J., Burger, C.J., dissenting).

A gender classification is "not invidious, [where it] rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 469 (1981). The archetypal realistic difference between men and women is that "females can become pregnant . . . males cannot." *Id.*, 450 U.S. 478 (Stewart J., concurring); *id.*, 450 U.S. at 498 (Stevens, J., dissenting) ("the capacity to become pregnant is what primarily differentiates the female from the male"). Classifications which realistically reflect the differences between the sexes are not invidious because they are not:

> overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.

Id., 450 U.S. at 469.

The dissenting opinion in *Michael M.* is not to the contrary. *Id.*, 450 U.S. at 489 n.2 (Brennan, J., White, J., Marshall, J.). *Michael M.* dealt with a "statutory rape" law with disproportionate impact upon gender lines. The dissent recognized the "uncontested fact that only females can become pregnant" but concluded the government failed to carry its burden to show a gender-neutral classification would be less effective. In contrast, because only

women have the legal right to choose abortion, no gender-neutral classification could serve the purpose of Petitioners – to save unborn girls and boys – as effectively.

2. Those Circuits Which Conclude That Gender Classifications Are Inherently Invidious Directly Contradict This Court's Jurisprudence.

In *Novotny*, the Third Circuit misconstrued a decision of this Court in *Frontiero, infra*, in announcing the proposition that gender classifications are always invidious.[11] *Novotny v. Great Am. Federal Sav. & L. Ass'n*, 584 F.2d 1235, 1243 (3rd Cir. 1978), *rev'd on other grounds, Great Am. Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366 (1979). As a result, and because no difference between the sexes was presented on the facts of that case, the Third Circuit did not account for the physical difference (that women can become pregnant) and the legal difference (that women have the right to seek abortions) between the sexes.[12] When this Court takes account of those differences, physical and legal, it cannot avoid a finding that "women seeking abortions" is not an invidious classification. This result obtains under both the majority and minority views of the Court. *Supra* Argument C(2)(a).

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[11] The gender classification in *Novotny* – based on archaic notions of the ability of women to do certain jobs as well as a man – was an invidious classification. Nonetheless, Section 1985(3) did not confer jurisdiction over that invidious private gender-based classification because there is no umbrella constitutional right to be free from private gender-based classification.

[12] *See, infra.*, n. 14.

The Fourth Circuit in the present case shared the error of the Third Circuit in *Novotny* – both courts failed to recognize the relevant issue. Neither this Court nor the lower courts need now decide whether private gender classifications are ever invidious, or always so. Rather, the appropriate issue to be determined on this Petition is whether this particular private gender classification – "women seeking abortions" – is invidious. *Novotny*, 442 U.S. at 390 n.6 (White, J., Brennan, J., and Marshall, J., dissenting) (sex classifications "may" be sufficiently invidious to come within Section 1985(3)). This Court also need not decide whether Section 1985(3) regulates invidious private gender classifications because "women seeking abortions" is not an invidious classification.

The Second Circuit also misconstrued *Frontiero* for the proposition that gender classifications are per se invidious. *N.Y. State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1359 (2nd Cir. 1989). Therefore, that court never addressed the issue of which bases of gender classification are invidious and which are not. Neither the summary finding in *Novotny* nor *Terry* provide any rationale to support the conclusion that gender classifications are inevitably invidious. Even if the Second, Third and Fourth Circuits have correctly read *Frontiero*, that case no longer sets the standard for gender-based classification.

3. This Court Has Expressly And Practically Rejected A Per Se Approach To Gender Classifications.

In *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court held that sex classifications were inherently

suspect. The Court rejected "dissimilar treatment for men and women who are . . . similarly situated" which results from stereotyped distinctions. *Id.*, 411 U.S. at 688 (quoting *Reed*, 404 U.S. at 77). The Court reasoned that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . and . . . frequently bears no relation to ability to perform or contribute to society." *Id.*, 411 U.S. at 686. The Court also noted that by passage of the Equal Rights Amendment and statutes prohibiting sex discrimination that Congress has concluded "classifications based upon sex are inherently invidious . . . "[13] *Id.*, 411 U.S. at 687-88.

The Court quickly "signal[ed] a retreat" from the *Frontiero* view that sex is a "suspect" classification. *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting). Although the Court continued to reject gender classifications where they are an "inaccurate proxy for other, more germane bases of classification," it has neither treated nor purported to treat gender classifications as uniformly invidious. *Id.*, 429 U.S. at 198. The trait purportedly represented by Respondents' class, that a woman can get pregnant and seek to terminate her pregnancy, is the one this Court has repeatedly recognized "actually comport[s] with fact." *Id.*, 429 U.S. at 199. The distinction obviously reflects a "physical difference between males

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[13] None of these congressional realizations had occurred when Section 1985(3) was enacted, and *Frontiero* accordingly never determined the applicability of Section 1985(3) to private gender classifications. *See, supra*, Section C.2.

and females . . . "[14] *Id.*, 429 U.S. at 212 (Stevens, J., concurring). The very description of the gender classification reflects the physical difference and therefore defeats the assertion that it is an invidious classification.

Even if *Frontiero* still applied to gender classifications, it would not convert "women seeking abortions" into an invidious classification because "the sex of the individuals involved" is not the "sole basis of the classification."[15] *Id.*, 411 U.S. at 688. The other bases besides sex are (1) that women can get pregnant, and (2) that women can exercise the legal right to seek an abortion. Any women receiving dissimilar treatment do not comprise a protected class because they are not women who are in "unprotected circumstances" or who are "similarly situated." *Id.*, 411 U.S. at 690. This Court need look no further than the words Respondents use to define their class to know that the alleged classification reflects real physical and legal differences between men and women and therefore is not invidious. Thus Respondents' claim fails.

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[14] It also reflects a legal distinction in that it is " 'a woman's decision whether or not to terminate her pregnancy.' " *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 60 (1976) (quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

[15] *See, supra*, Section B.

CONCLUSION

For all the foregoing reasons, the judgment of the Fourth Circuit must be reversed and Petitioners must be declared prevailing parties.

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